



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

Attorney General Merrick Garland
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Secretary Alejandro Mayorkas
Department of Homeland Security
3801 Nebraska Avenue, NW
Washington, DC 20395

via email

July 22, 2024

Re: Ensuring Consistency and Fairness in Ineffective Assistance of Counsel Cases

Dear Attorney General Garland and Secretary Mayorkas:

On behalf of the American Immigration Lawyers Association, we write to urge you to reform the legal standard governing ineffective assistance of counsel (IAC) claims in immigration matters. Specifically, immigration courts currently require an individual to file a bar complaint against their prior attorney before bringing an ineffective assistance claim against the attorney. The bar complaint requirement is found only in immigration law; it was created by the Board of Immigration Appeals (the Board), and is inconsistent with well-established standards in criminal law. Lawmakers have also recognized this problem. Specifically, Senator Chris Murphy (D-CT) introduced the “Strengthening Immigration Procedures Act of 2024” to remedy it.

We urge you to remove the bar complaint requirement in that: (1) the Department of Justice (DOJ) and Department of Homeland Security (DHS) should issue a joint regulation that removes the bar complaint requirement for IAC claims in any immigration matter; and (2) the Attorney General should revisit the existing BIA decision *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) under his statutory certification authority and establish a new standard.

I. Background on Ineffective Assistance of Counsel

The requirement that a bar complaint be filed to raise a claim of IAC is unique to immigration law. The U.S. Supreme Court established the standard for determining when the right to counsel warrants the overturning of a criminal conviction due to IAC in *Strickland v. Washington*, 466 U.S. 668 (1984). The Board adopted this same standard for immigration cases months later in *Matter of Santos*, 19 I&N Dec. 105 (BIA 1984). Neither of these cases contemplated the need for filing a bar complaint as a prerequisite to review or relief.

This changed in the immigration context four years later when the Board decided *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). Departing from the *Strickland* standard, the Board set out its own three-prong test in cases involving claims of IAC.

Under this test, noncitizens requesting that a case be reopened, or certain decisions be reconsidered based on IAC must:

1. Include an affidavit by the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;
2. Inform the attorney whose integrity or competence is being impugned of the allegations leveled against them, and the attorney must be given an opportunity to respond; and
3. File a bar complaint.¹

In practice, the requirement to file the bar complaint is not relevant to the immigration court's review of the IAC case. Paradoxically, the immigration judge deciding the merits of a motion to reopen does not need to wait for the outcome of the disciplinary proceeding, which can take months or years to process. Disciplinary authorities also do not wait for a decision from the immigration court. All that is required under *Lozada* is to file a bar complaint, which does not provide meaningful guidance to the immigration court or to the disciplinary authority. The fact that the determination of the disciplinary proceeding has no bearing on the outcome of the motion to reopen underscores the fact that the bar complaint is unnecessary to the immigration court's finding of IAC.

II. Requiring a Bar Complaint Compromises Due Process in Immigration Cases

Requiring that a bar complaint be filed undermines fairness, equity and accuracy in immigration cases and has a chilling effect on access to counsel, frequently dissuading attorneys from providing representation in the cases that need them most.

The bar complaint requirement adds an additional, unnecessary procedural requirement that serves as a barrier for people to obtain a fair, just ruling in their case when their prior counsel's performance was ineffective. Not only must they satisfy the substantive requirements that derived from the *Strickland* standard (i.e., demonstrate that counsel's performance was deficient and prejudiced the client), but they also must comply with *Lozada's* procedural requirements, including the filing of a bar complaint (potentially in several jurisdictions), even if the deficient performance and prejudice is clear from the record. Failure to satisfy both the substantive and procedural requirements can result in a noncitizen's motion to reopen or reconsider² being denied, even where the ineffective performance and prejudice is clear on its face.

Consider the case of "Maylen," a wife of a former U.S. military serviceman and mother of three young children. Maylen had overstayed her visa and was placed in removal proceedings. Her attorney did not properly explain the options available to her and advised her to take voluntary departure. The attorney did not explain the severe consequences of accepting voluntary departure

¹ The formal requirement is to explain in the relevant motion whether a complaint has been filed with the appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and *if not, why not*. This "if not, why not" exemption from the bar complaint is rarely applied and is not recognized by the Board. To the contrary, it is commonly understood amongst immigration lawyers that *not* filing a bar complaint might subject an attorney to a future bar complaint of their own.

² It should be noted that in some jurisdictions, *Lozada* also applies to direct appeals. See *Yi Long Yang v. Gonzales*, 478 F.3d 133, 142 (2d Cir. 2007); cf. *Correa-Rivera v. Holder*, 706 F.3d 1128, 1130–31 (9th Cir. 2013); *Ferreira v Barr*, 939 F.3d 44 (1st Cir. 2019).

that would bar her in the future from applying for a green card in the United States for at least 10 years. That failure by the first attorney constituted deficient and ineffective legal counsel because Maylen was forced to make a decision based on incomplete information. In this way, it was neither knowing, intelligent or voluntary.

Maylen's husband is able to petition for his wife to become a lawful permanent resident. Maylen should have been able to file for adjustment of status to become a lawful permanent resident--except for the existence of the final order of removal. To clear the way for her adjustment of status, the immigration court would have to reopen her case. Unfortunately, the current requirement under *Lozada* that she file a bar complaint proved the undoing of Maylen's ability to reopen her case and obtain lawful permanent resident status. The original attorney could not be identified, so there was no way to file a bar complaint and comply with the mandatory requirement for an IAC claim. The result was that Maylen had no way to reopen her case with the court. Her application process became a series of drawn-out processing backlogs and administrative delays. For ten years, Maylen and her family have tried to correct the attorney's error from over a decade earlier. If the bar complaint requirement were eliminated, Maylen would have been able to proceed in her claim.

Finally, the requirement to file a bar complaint can have a chilling effect on representation, which impacts due process by reducing the availability of legal counsel. The bar complaint requirement pits immigration attorneys against each other. As a result, it creates a situation where many members of the immigration bar refuse to take on new clients that would require filing a *Lozada* Motion to Reopen, out of concern that it would foster ill-will from their colleagues because the new counsel would have to file a bar complaint against the prior counsel. The bar complaint requirement has also discouraged many immigration attorneys from practicing in the area of removal defense altogether for fear of a frivolous bar complaint being filed against them. It has resulted in respected immigration attorneys leaving the profession, and in extreme cases, even suicide. This chilling effect exacerbates the severe legal services gap in immigration law,³ which has worsened with the growing immigration court dockets. In contrast, having competent legal counsel in a removal case helps streamline the process, making proceedings not only fairer, but also more efficient.

III. Recommendations to DOJ and DHS

The solution to this problem is for the **DOJ and DHS to release joint regulations** that revise the legal standard and eliminate the bar complaint as a prerequisite to ineffective assistance claims in immigration matters. The regulations should reinstate the *Strickland* standard for immigration cases. Regulations would provide a lasting solution to this problem and ensure consistent application of the *Strickland* standard at both DHS and DOJ. At a minimum, the regulations should

³ See Karen Berberich and Nina Siulc, "Why Does Representation Matter? The Impact of Legal Representation in Immigration Court," Vera Institute of Justice, Nov. 2018, <https://www.vera.org/downloads/publications/why-does-representation-matter.pdf>.

remove references to the standard laid out in *Lozada* for IAC claims in asylum regulations,⁴ USCIS policies for Child Status Protection Act cases, and some administrative appeals before USCIS.⁵

Regulatory changes are necessary, but while such changes are being considered, an immediate remedy is also available. While less complete and less durable, the Attorney General should revisit *Lozada* under his statutory certification authority and establish a legal standard that removes the bar complaint requirement and affirms the *Strickland* criteria for immigration matters. This approach would not necessarily ensure consistent application of the standard to DHS and its component agencies.

Importantly, these changes would not impact the filing of a bar complaint in the case of unethical conduct by the prior attorney. Removing the mandatory nature of the bar complaint requirement under *Lozada* will ensure the system functions in an efficient, effective, and fair manner.

These proposed changes would ensure that noncitizens facing harm due to deficient representation are able to obtain justice more expeditiously and remove a significant barrier. Moreover, it would facilitate the more consistent and fair administration of justice by judges and other adjudicators in cases where errors have been made by counsel that have prejudiced their clients. Preserving due process while safeguarding the practice of immigration law will benefit the public and those involved and bolster the integrity and credibility of the system.

We appreciate your urgent consideration of these recommendations and are available to discuss them with your staff. If you have any questions, please email Amy Grenier at agrenier@aila.org or Greg Chen at gchen@aila.org.

Sincerely,

Benjamin Johnson, Executive
Director



Jeff Joseph, President-Elect



Kelli Stump, President



Alexis S. Axelrad, First Vice
President



⁵ For example, 8 CFR §§ 208.4(a)(5)(iii) and 1208.4(a)(5)(iii) include, as an exception to the one-year filing deadline for asylum applications, a demonstration of counsel's ineffectiveness through the *Lozada* framework. The USCIS Policy Manual, Chapter 7, also prescribes a procedure under the *Lozada* framework to demonstrate that counsel was ineffective in failing to timely seek to acquire permanent resident status in order to protect the age of the child under the Child Status Protection Act. Although not strictly required, practitioners also file bar complaints with respect to administrative filings with the USCIS based on nonprecedential AAO decisions that require adherence to the *Lozada* framework when filing a motion to reopen with the USCIS *See, e.g., In Re: 33043191* (AAO, May 30, 2024) and *In Re: 30885683* (AAO, April 24, 2024).

Jacqueline Watson, Second Vice President



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